

TENNESSEE ETHICS COMMISSION

MINUTES OF MAY 22, 2007

Pursuant to the call of Chairman Thomas J. Garland, the Tennessee Ethics Commission ("Commission") met on Tuesday, May 22, 2007, at 9:00 a.m. in the auditorium of the Tennessee State Library and Archives Building in Nashville, Tennessee.

The following members were present:

Thomas J. Garland, Chair

R. Larry Brown

Donald J. Hall

Linda W. Knight

Dianne F. Neal

Benjamin S. Purser, Jr.

CHAIRMAN THOMAS J. GARLAND CALLED THE MEETING TO ORDER AT 9:02 A.M.

Chairman Garland stated that the Commission had received a confidential memorandum from the Attorney General's Office and has responded to requests that there be more discussion regarding procedural issues before the memorandum would come before the body. Therefore, he announced that the Executive Session item listed at the bottom of the agenda would not be discussed today.

Chairman Garland sought approval of the April 24, 2007 meeting minutes.

Commissioner Hall moved to approve the April 24, 2007 meeting minutes.

The motion was seconded.

The motion was unanimously approved.

CHAIRMAN GARLAND RECOGNIZED BRUCE ANDROPHY FOR THE EXECUTIVE DIRECTOR'S REPORT.

Mr. Androphy announced that, as of today's date, 535 lobbyists and 673 employers of lobbyists have registered with the Commission and approximately \$425,000 in registration fees have been collected. He suggested that the current increase in employer registrations is a result of the employer disclosure fillings.

Mr. Androphy stated that as of May 18, 2007, 500 employers of lobbyists have filed the Semi-Annual Lobbying Expenditure Report and 420 forms have been posted on the Commission's website. He announced that 470 should be posted by tomorrow, May 23. He stated that some of the submitted forms are not complete and staff is contacting these employers for further information. He also informed the Commission that the governmental entities that voluntarily registered may also submit the disclosure forms on a voluntary basis.

Mr. Androphy proposed sending a warning letter to those employers that have not yet filed their disclosure reports. Commissioner Brown asked how the letters were to be delivered. Mr. Androphy confirmed that the letters were to be sent by certified mail.

Mr. Androphy discussed the lobbyist training sessions scheduled for June and September. Commissioner Knight suggested having other ethics training dates later in the year as many of the lobbyists would not yet know if they will continue lobbying for the following year.

Mr. Androphy gave a presentation of the Commission's website. He stated that most information has been posted within 24 hours. He displayed examples of the submitted Lobbyist Expenditure Disclosure Reports filed by employers of lobbyists. He also showed examples of the financial disclosure forms submitted by local officials and other state officials. Next, Mr. Androphy displayed the New York version of the on-line ethics training for lower-level state employees. He stated that the Tennessee Department of Personnel expressed an interest in assisting the Commission in developing the on-line training for middle and lower-level state employees.

Commissioner Neal restated her objection to spending money and staff time on producing an on-line training course at this time. She suggested that the Commission must first meet all of its statutory demands before any time or money is spent on training beyond the statutory requirements. There was consensus to prioritize the current demands of the Commission.

Mr. Androphy announced that the staff has been contacting the county election boards around the state to verify the information for all of the local officials that have not yet filed their Disclosure of Interest Statements. He presented a proposed civil assessment letter to the Commissioners to be sent to all the local officials that have already received one warning letter and have failed to file.

Commissioner Purser requested a history of the steps that have occurred since January 1 of this year regarding the filing of these Statement of Disclosure of Interests forms by the local officials across Tennessee. Mr. Androphy discussed the process. He also described how some information provided by the local election commissions had to be updated to provide the correct individuals with the notification to file the form.

Commissioner Purser approved of the proposed civil assessment letter to be sent to the non-filing local officials before the next meeting. Commissioner Brown agreed and reiterated the need to obtain current information regarding these officials before the civil assessment letters are sent.

General Counsel, Anne Turner, stated that the statute requires the Attorney General's office to collect these fees. Commissioner Knight requested a memorandum from staff regarding the statutory procedure for collecting any fees that are assessed.

Mr. Androphy discussed the new online registration system for electronic filing for lobbyists and employers of lobbyists. He stated that NICUSA has announced that they will not be able to meet an October 1, 2007 deadline for the new system if the Legislature does not change the filing date to January 1, 2008. He stated that there is no written contract with NICUSA to have a completion date of October 1.

Commissioner Knight asked Mr. Androphy about the current contract with NICUSA. Mr. Androphy stated that the contract with NICUSA has a contingency date for January 1, 2008. He also stated that the representatives from NICUSA apprised him of the inability to have a completion date of October 1, 2007 approximately three weeks prior.

Chairman Garland asked Mr. Androphy if the Commission has a contractual relationship with NICUSA. Mr. Androphy stated that NICUSA is the state's preferred vendor and the Commission has an agreement with the company.

Chairman Garland suggested getting more information from NICUSA regarding possible options. He also stated that, by the next Commission meeting, it should be known whether the registration date is moved to January 1, 2008.

Mr. Androphy began the discussion for the selection of the lobbyists for the yearly audit. Commissioner Neal clarified that the selection process was to be performed in the next public session and that this should be a specific item in the notice of the next public meeting.

Chairman Garland announced that the random selection process for the lobbyist audit will be performed at the next Commission meeting at 2:30 p.m. on June 27, 2007 in the State Library and Archives Building.

Mr. Androphy discussed the lease for the Commission's office. He stated that he has completed the required forms with the Department of Finance and Administration for bids for a 5-year lease and he affirmed his hope that the Commission will keep its office in the SunTrust building.

Mr. Androphy discussed other items in the budget. He stated that the dollar amounts will not change from the last meeting, however; staff time and expenses will need to be reapportioned.

Ms. Turner presented a copy of the proposed civil assessment letter to be sent to the employers of lobbyists that have failed to register. She described a current employer that has failed to register, although the employer was sent a warning letter on May 1, 2007 with a deadline of May 14, 2007 to register. She stated that the employer has not responded to the request.

Commissioner Knight asked for clarification regarding the possible maximum penalty available by the statute for employers who have not yet registered. Ms. Turner stated that

the fee is \$25 per day, beginning five days after receipt of the letter, up to a maximum fine of \$750.

Commissioner Knight also discussed the difference in language regarding the assessment of penalties for non-registering employers and non-filing local officials, as the statute reads “may” regarding employers and reads “shall” regarding local officials. Commissioner Hall confirmed this distinction for the Commission’s ability to assess penalties.

Commissioner Neal stated that the Commission will not be able to assess a civil penalty for an individual without the opportunity for the person to be heard. She suggested putting language in the letter to reiterate the individual’s rights before the civil penalty is assessed.

Mr Androphy confirmed that the letter provided the recipient the right to appear in person or to submit a letter to the Commission and that it is an informal proceeding.

Commissioner Neal and Commissioner Knight stated the need to promulgate rules to address this type of hearing for assessment of civil penalties.

Commissioner Hall suggested that the language in the letter did not conflict with the statute. He stated that adoption of the current draft of the letter would therefore, not be improper.

Ms. Turner, stated that in her opinion, the Commission is not required to give step-by-step procedures to assess civil penalties, so long as the rule states that the person will have the opportunity to be heard. She confirmed that she had obtained the structure for assessing civil penalties from the Registry of Election Finance.

Commissioner Brown suggested referencing the statute in the letter to give the notice.

Commissioner Hall moved to follow the statute in its entirety along with the current rules of the Commission, without promulgating a new rule for the informal show cause hearings for civil assessments at this time.

Commissioner Brown seconded the motion.

The motion passed.

Commissioner Hall moved for adoption of the letter with the suggested additional language to refer to the statute.

Commissioner Brown seconded the motion.

The motion passed.

CHAIRMAN GARLAND RECESSED THE MEETING FOR A SHORT BREAK AT 10:52 A.M. AND RECONVENED THE MEETING AT 11:06 A.M.

Note: Commissioner Knight left the meeting for a short phone call. She returned to the meeting at 11:12 a.m.

CHAIRMAN GARLAND RECOGNIZED GENERAL COUNSEL, ANNE TURNER, TO BEGIN THE DISCUSSION OF THE PUBLIC RECORDS RULES.

Ms. Turner presented the current draft of the public records rules to the Commissioners. Commissioner Neal presented two discussion items that were part of one of the motions of last month's meeting. The first item was to add language in the rules to state the current physical address of the Commission's office so that the public may have notice as to where to access the records. The second item was to add language to state that the custody of the records will be by the Commission for five years, pursuant to the pertinent statute. She asked why the staff was permitted to reopen issues which were decided in a previous meeting by voice vote.

Commissioner Brown suggested putting the language, "... housed at the office of the Tennessee Ethics Commission," instead of putting a current address, as the Commission office may move. Commissioner Purser agreed with this language and suggested adding another sentence to state the current address of the Commission.

There was consensus to leave the physical address out of the rules.

Commissioner Neal renewed her request for adding language to state how long the records will be retained by the Commission.

Commissioner Purser suggested that the majority of the records will soon be in an electronic form and recommended that the rules for the retention of these types of records should be considered.

Commissioner Brown suggested referencing the statute for records retention, rather than just stating a five-year time frame, in order to maintain compliance with the statute. Commissioner Knight suggested stating that it will be governed by state law. There was consensus to add this language to the rule.

Ms. Turner referred to paragraph 5 at the bottom of page 2. Commissioner Knight suggested deleting "is protected" from the second sentence of paragraph 5.

There was consensus to this language deletion.

Ms. Turner stated that there was discussion at the previous Commission meeting to change the records reproduction list to a fee scheduling format with additional explanation for the fee derivations. She referenced page 3 of the current draft of rules.

Commissioner Hall referred to section (g) regarding the computer programming time. He stated that the fee should be \$18.00 per half hour plus the copy costs of (a) and (b). There was consensus to make this change.

Commissioner Hall also referred to section (h). He stated that the reference should be to section (g), not section (f).

There was consensus to make this correction.

Commissioner Hall referred to section (h) regarding the minimum charge for the computer programming time. He suggested that the \$108.00 should not include the language "per hour."

Commissioner Knight suggested changing the language in (g) to state \$18.00 per half hour with a minimum total charge of \$108.00. There was consensus to make this change.

Commissioner Knight suggested that there is no difference between a copy and a page in the (a) and (b) fee section of routine and non-routine copies, and the language should be adjusted for consistency.

Commissioner Knight referred to section (f) regarding facsimile transmission and asked if a 100 page fax would still be \$5.00. Mr. Androphy suggested adding language to state there will not be a charge if the facsimile is less than 10 pages, but there would be a charge of \$5.00 for every 10 pages thereafter.

Commissioner Knight asked what agency would perform any necessary computer programming for a reproduction request. Mr. Androphy stated that the Commission would have to find an outside vendor to perform this service.

Commissioner Neal referred to paragraph 7 regarding copying by an individual that brings in his or her own copying equipment. She recommended language in the rules to clarify that there is no charge for this type of copying, unless excessive staff time is necessary to accomplish the copying request. Commissioner Brown suggested allowing the Executive Director discretion to determine how much staff time is excessive. Commissioner Neal stated that she would be comfortable with removing paragraph (c). There was consensus to make these suggested changes.

Ms. Turner announced that the rules will be sent to the Attorney General's office and filed with the Secretary of State's office and a later public hearing would be held.

Commissioner Purser moved for adoption of the Public Records Rules with the suggested changes along with the 72-hour window for future stylistic changes.

Commissioner Hall seconded the motion.

The Public Records Rules were unanimously adopted.

CHAIRMAN GARLAND RECESSED THE MEETING FOR LUNCH AT 11:57 A.M.
AND RECONVENED THE MEETING AT 12:20 P.M.

CHAIRMAN GARLAND RECOGNIZED MR. ANDROPHY TO BEGIN THE DISCUSSION REGARDING THE GUIDING PRINCIPLES OF ETHICAL CONDUCT.

Mr. Androphy stated that the Commission must first decide whether it wished to move forward with the drafting of the Guiding Principles at this time.

Commissioner Hall suggested that the statute states that the Commission will provide these Guiding Principles and he recommended that the Commission should proceed. Commissioner Purser agreed and asked the Commissioners to complete the task at this meeting.

Commissioner Neal announced that she had spoken with Senator Kyle and former Representative McMillan regarding the issue of guiding principles, as they both had participated in the ethics committee meetings during the drafting of the Comprehensive Ethics Reform Act. She stated that Senator Kyle suggested that the Guiding Principles should be broadly drafted with succinct statements. He gave the example that one of the principles should be, "Don't take money during session." She opined that this would include campaign contributions, as well as bribery. She stated that Senator Kyle and former Representative McMillan both envisioned broad principles, and not a reiteration of the Act.

Mr. Androphy suggested that the current draft is primarily comprised of broad principles. He also stated that all the principles are defined in "shoulds" not in "musts" or "must nots."

Commissioner Hall suggested a drafting change for consistency to state, "A public official should not..." throughout the Guiding Principles. There was consensus to this change.

Commissioner Hall also suggested that the Guiding Principles should not include footnotes to show references to different jurisdictions other than references from Tennessee.

Commissioner Hall moved to delete any non-Tennessee references in the footnotes. Commissioner Purser seconded the motion. Chairman Garland asked for further discussion on the proposed motion.

Commissioner Knight suggested putting notations in the areas that are not currently covered by Tennessee law in the footnotes of the Guiding Principles. The Commissioners voted to pass Commissioner Hall's motion.

Commissioner Hall moved to adopt the current draft of the Guiding Principles with the suggested changes from the meeting today.

Mr. Androphy stated that he will make stylistic changes to the first draft, by incorporating Commissioner Knight's stylistic changes from the edited draft, and provide the Commissioners with the new draft within the 72-hour period.

Commissioner Brown also reminded the Commissioners that the governing bodies adopting these Guiding Principles may choose to modify these principles as needed. He also reiterated that the Guiding Principles are purely aspirational.

Commissioner Knight stated her concern that if the Guiding Principles differ from current state law, it may appear that the Commission is stating that the current law on the issue is somehow not ethical.

Commissioner Neal reminded the Commissioners that an important consideration is how these suggested Guiding Principles will be received by the governing bodies, as these bodies will make the determination to adopt the principles or not. Commissioner Brown affirmed his belief that these principles are to be given as a resource only.

Commissioner Knight stated that her primary concern was with Article III, (3). She noted that this section, as well as Article III, (5), have references to percentages and dollar amounts that should not be included in the Guiding Principles. Commissioner Brown suggested adding the language, "unless permitted by law" for these contracting areas. There was consensus to remove the percentages and dollar amounts for these two paragraphs (3) and (5).

Commissioner Brown referred to Article III, Section 2, paragraph (5), regarding the hiring of family members. He suggested adding language to clarify that the official should not hire immediate family members for official state purposes, and does not include hirings for any type of outside business.

Commissioner Hall moved to adopt the Guiding Principles with the suggested changes.

Commissioner Purser seconded the motion.

The motion carried.

Chairman Garland reminded the Commissioners that the 72-hour window for stylistic changes may be extended due to the upcoming Memorial Day weekend.

CHAIRMAN GARLAND MOVED THE DISCUSSION TO THE GUIDELINES WITH RESPECT TO PERMISSIBLE DISCOUNTS OFFERED TO STATE EMPLOYEES AND GUIDELINES WITH RESPECT TO PARTICIPATION IN CHARITABLE EVENTS SPONSORED BY EMPLOYERS OF LOBBYISTS.

Mr. Androphy presented a current draft of the Guidelines to the Commissioners. Commissioner Neal stated her concern that guidelines will not provide legal protection

for someone interpreting them in determining his or her course of conduct. She stated that, under T.C.A. § 3-6-308(a)(4) and T.C.A. §3-6-107(3), advisory opinions are based on a specific requestor on specific facts in order for the Commission to properly determine the issue on which an individual may rely.

Chairman Garland suggested that public officials will often expect a “yes” or “no” answer on many questions in a short time frame.

Commissioner Purser suggested that the staff keep track of the number and types of questions that are received and are not followed up by a request for an advisory opinion.

Commissioner Knight also requested the staff to keep a log of the questions asked, the differing opinions among staff, and the responses given in order to keep track of past communications.

Commissioner Brown stated that the guidelines would be helpful for the staff in making consistent responses to the public’s questions. Commissioner Hall agreed.

Commissioner Knight suggested having the guidelines as an internal office policy, instead of having them as guidelines for the public.

Commissioner Neal moved to table the guidelines as presented today to allow time for the staff to prepare a legal memorandum that discusses the issues used to formulate the drafted guidelines.

Commissioner Brown seconded the motion and also requested the staff to provide specific examples along with the individual staff member responses.

The motion carried.

CHAIRMAN GARLAND ANNOUNCED THE NEXT MEETING DATES TO BE JUNE 27, 2007, AT 1:00 P.M. AND JUNE 28, 2007, AT 9:00 A.M. THE JULY MEETING WAS SCHEDULED FOR JULY 31, 2007, AT 9:00 A.M.

THERE BEING NO FURTHER BUSINESS, CHAIRMAN GARLAND ADJOURNED THE MEETING AT 2:10 P.M.

Respectfully Submitted,

Melinda R. Arrington